DISTRICT OF COLUMBIA
DEPARTMENT OF INSURANCE AND SECURITIES REGULATION

In Re: Application of WellPoint Health Networks Inc.
regarding Conversion And Acquisition of Control
of Group Hospitalization and Medical Services, Inc.

COMMENTS OF D.C. APPLESEED CENTER FOR LAW AND JUSTICE, INC. ON PROPOSED CASE MANAGEMENT ORDER

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COMMENTS OF D.C. APPLESEED CENTER FOR LAW AND JUSTICE, INC. ON PROPOSED CASE MANAGEMENT ORDER

The D.C. Appleseed Center for Law and Justice, Inc. ("D.C. Appleseed") hereby submits comments on the Proposed Case Management Order ("Proposed Order") issued by the Commissioner of Insurance on April 5, 2002 as Appendix 1 to his Preliminary Order in this proceeding.

D.C. Appleseed is an independent nonprofit advocacy organization dedicated to making the District of Columbia and the Washington Metropolitan area better places in which to live and work. Health insurance and the availability, accessibility, and affordability of health care, vitally affect both the quality of life and the quality of the workplace. D.C. Appleseed conducts nonpartisan analysis and develops and advocates concrete proposals to enhance the performance and financial health of public institutions that affect the District.

D.C. Appleseed is authorized to state that National Capital Area CareFirst Watch supports these Comments in their entirety. National Capital Area CareFirst Watch is a coalition of consumer, public health, and provider organizations (including both nonprofit and for-profit providers) that use, provide, and advocate with respect to, health care and public health services in the National Capital Area. The Coalition was formed for the

purpose of evaluating the merits of the proposed Transaction, helping to organize the community response, and participating in the proceedings that will determine whether the Transaction should be permitted.

WellPoint Health Networks Inc. (the "Applicant" or "WellPoint") has proposed a two-part transaction: the conversion of Group Hospitalization and Medical Services, Inc. ("GHMSI") from a nonprofit to a for-profit entity, and WellPoint's acquisition of control of GHMSI. (Unless otherwise indicated, we will refer to both elements together as the "Transaction.") The Hospital and Medical Services Corporation Regulatory Act ("Medical Services Act") governs the proposed conversion. *See* D.C. Code § 31-3515. The Holding Company System Act ("Holding Company Act") governs the proposed acquisition of control. *See* D.C. Code § 31-703. The Medical Services Act deals specifically with conversions of nonprofit health care entities. The Holding Company Act is a generic statute that applies to any acquisition of control of any type of insurer authorized to do business in the District.

The proposed Transaction has attracted widespread and growing attention, both in the District and in the three other jurisdictions that would be affected. As D.C. Appleseed stated in its March 6, 2002 letter to the Commissioner, the application "places before you what is probably the most significant health-related transaction presented in the National Capital Area in decades."

The Proposed Order appropriately recognizes that this is a "contested case." The Commissioner obviously crafted the Proposed Order with the goal of creating a full and fair public record, with reasonable opportunity for interested persons to be heard. In some critical particulars, however, the Proposed Order falls short of that goal. We recognize that some of the limitations reflect apparent statutory constraints, but believe

that these do not compel the arrangements in the Proposed Order, which would deny participants any practical opportunity to submit evidence, and any opportunity to submit discovery requests, with respect to the final Application. Further, the Proposed Order is silent as to certain matters that need to be resolved in advance of the filing of evidence.

SUMMARY

D. C. Appleseed proposes revisions to the Proposed Order, and some additional measures, that will help ensure a fair opportunity to be heard, an efficient proceeding, and a sound determination of the public interest.

First, the Proposed Order establishes a framework for different levels of participation, by recognizing two classes of participants: "Parties" and "Interested Persons." This is an appropriate approach in light of the broad interest that the proposed Transaction has engendered. The opportunity afforded Interested Persons to participate, however, would not fully allow the contributions to the public record that could flow from diverse levels of participation.

- Interested Persons should be allowed to pull together the record and argue facts, law and policy in final written briefs, on the same schedule that governs Parties. This briefing opportunity would not adversely affect the efficiency of the proceeding or the rights of any Parties.

- Under the Proposed Order, a person would become a Party for all purposes or none. Given the diversity of affected interests and the novelty of the issues, it would be prudent for the Commissioner to reserve the right to admit Parties for specified, limited purposes.

Second, the Proposed Order would provide no practical opportunity for Parties to submit opening or rebuttal evidence, a Pre-Hearing Brief or a Reply Brief, relating to the *final* Application. Further, the time period for submitting discovery requests would end *before* the filing of the final Application. This gravely flawed arrangement, which would treat WellPoint's July 16 filing as a "draft" application and defer the filing of a final

application until October 15, apparently reflects the requirement in the Holding Company Act that hearings begin within 30 days of the filing of an application.

- The simplest and speediest remedy for the inadequate opportunity of Parties to address the final Application would be for WellPoint to agree to an extension of the 30-day period provided in the Holding Company Act for the commencement of hearings. The July 16 WellPoint filing could then be the final Application; Parties could pursue discovery and develop evidence and Pre-Hearing Briefs with full knowledge of the content of the final Application; and the hearing could begin at or shortly after the November 12 start-up date provided in the Proposed Order.

    - A failure by WellPoint to agree to an extension of the 30-day period would tend to confirm the concerns of many that WellPoint will not be responsive to local concerns.

    - If WellPoint does not agree to an extension of the 30-day period, the Commissioner should bifurcate his consideration of the WellPoint Application, by first considering the proposed *conversion* under the Medical Services Act (which leaves the Commissioner broad discretion as to the process and timetable) and then considering the proposed *merger* under the Holding Company Act. The Commissioner has the legal authority to conduct his docket in this way, and he should be prepared to do so.

Third, the Proposed Order rightly emphasizes the importance of coordination with the Corporation Counsel. D. C. Appleseed suggests that an important early first step in such coordination would be a proposed joint statement of the issues to be considered by the Commissioner and the Corporation Counsel, with opportunity for public comment.

- Some of the issues to be considered by the Commissioner and the Corporation Counsel may well overlap. Developing a joint statement of issues and providing opportunity for comment will facilitate coordination, and may identify a need for special procedures.

- The joint statement need not be very detailed, but should fairly apprise interested persons of the proposed allocation of responsibilities. The joint statement could be amended as issues get refined or as new issues emerge.

Fourth, the Commissioner should clarify that the ultimate burden of proof (risk of non-persuasion) with respect to a material issue rests with the Applicant, once an

opponent has introduced credible evidence on that issue. The statutes assign the burden of coming forward to opponents, but not the ultimate burden of proof.

- To interpret the statutes as placing the ultimate burden of proof on opponents would be to place risks on the public that the D.C. Council is unlikely to have intended.

- For example, if the burden of proof were on opponents, the Commissioner might have to approve the Application even if he found that the Transaction is as likely as not to cause premium rate increases in excess of increases in medical costs.

Fifth, the Proposed Order provides until July 30 for persons to file motions to intervene as a Party (the Intervention Cut-Off date). Some persons may file earlier, however, because a person is not entitled to discovery unless and until the Commissioner has designated that person as a Party.

- The Commissioner should undertake, in the event that persons file motions to intervene in advance of July 30, to decide such motions promptly, without waiting until after the Intervention Cut-Off date.

- A decision deferred until after the Intervention Cut-Off date would leave less than a month for service of discovery, which would likely be an insufficient period for some Parties.

Sixth, the Proposed Order provides that the staff of the Department of Insurance and Securities Regulation ("DISR") may participate as a Party in this proceeding.

- The Commissioner should confirm in his final Case Management Order that such participation will be accompanied by a corresponding separation of functions, which fundamental fairness requires.

- Under the requisite separation, staff participating as a Party would not communicate ex parte with the Commissioner with respect to this case, or with any other staff that is advising the Commissioner with respect to this case.

Seventh, the Proposed Order states that the Commissioner will promulgate DISR Rules of Practice and Procedure for Hearings prior to the hearings in this proceeding.

- The Commissioner should provide notice and opportunity for comment before finally adopting such rules.

- Notice and opportunity for comment are required by the D.C. Administrative Procedure Act (D.C. Code §§ 2-505(a), (c)), and will in any event help to ensure that the procedures adopted support an efficient and fair hearing.

I. CLASSES OF PARTICIPANTS

The Proposed Order would recognize two classes of participants: "Parties," and "Interested Persons." A Party would have the familiar rights and obligations associated with participation in a formal proceeding, including rights of discovery and cross-examination. An Interested Person "will be given a reasonable opportunity to offer oral or written statements at the Public Hearing." Proposed Order, at 3. Written evidence would be filed no later than 15 days prior to the commencement of the Hearing (which would be on or about the day that Parties would be filing rebuttal evidence and Reply Briefs). D.C. Appleseed supports the proposed creation of a participant class that will have the opportunity to be heard orally or in writing, but without rights to discovery and cross-examination, and without the obligation to serve all Parties.

At the same time, D.C. Appleseed believes that the Interested Person category would be likely to cover a very broad range of participants, from citizens wishing to do no more than submit a letter or brief oral statement for the record, to individuals with special expertise who choose on their own to share their knowledge at length, to organizations that may wish to present extensive evidence, including sworn statements, but that do not consider discovery and cross-examination to be essential to their purpose.

The concept of Interested Person as proposed would not fully allow the contributions to the public record that could flow from these diverse levels of participation. It could be made adequate without jeopardizing the efficiency of the proceeding or the rights of any Parties.

The Proposed Order contemplates that Interested Persons would have an opportunity to present a sworn or unsworn written or oral statement at the Public Hearing, but without opportunity to file a final written brief. If that understanding is correct, we would suggest that the proposal is unduly limiting. The absence of discovery and cross-examination is not a reason to limit categorically the opportunity of Interested Persons, in a final written brief, to pull together the record and argue the facts or advance considerations of law and policy. While most Interested Persons will likely find it sufficient to provide a single oral or written statement, there may well be some who will be able to contribute valuably to the public record through formal briefing.[1] Allowing such further participation will not prejudice the Applicant or any other participant in the proceeding. If final written briefs by Interested Persons were required to be filed on the same day as Parties' briefs, there would be no delay the proceeding.[2]

As a separate point, we note that, under the Proposed Order, a person would become a Party for all purposes or none at all. Given the diversity of affected interests and the novelty of the issues, it seems prudent for the Commissioner to reserve the right to admit Parties for limited purposes. The D.C. Administrative Procedure Act states that "nothing herein shall be construed to prevent the Mayor or an agency from admitting . . . any person . . . as a party for limited purposes." D.C. Code § 2-502(10). The Holding Company Act defines who is entitled to become a party, but it, too, contains nothing that would bar participation as a Party for limited purposes. While this option may turn out to

[1] In addition, Interested Persons should have the opportunity provided to Parties under the Proposed Order to submit additional written evidence at the Public Hearing upon a showing of good cause why the evidence could not, with reasonable diligence, have been presented prior to the Hearing. *See* Proposed Order, at 5.

[2] Applicant or any other Party (or Interested Person) would of course be free to argue that the absence of an opportunity to conduct discovery or cross-examination with respect to particular factual assertions of an Interested Person should, in the circumstances, reduce the weight to be given to those assertions.

be unnecessary, we see no reason for the Commissioner not to preserve his flexibility at the outset.

II. TIME PERIODS FOR EVIDENCE AND BRIEFS

Under the Proposed Order, the Applicant is to file its final Amended and Restated Application on October 15, 2002. One week later, on October 22, Parties would file Pre-Hearing Briefs and written testimony and documentary evidence opposing or supporting the Application; and one week after that, on October 29, Parties would file Reply Briefs and Rebuttal evidence.

This schedule would entail an extraordinary compression of these critical phases of the proceeding. This proposed schedule, along with treating the July 16 revised Application as a "draft," apparently reflects the requirement in the Holding Company Act that the public hearing be held within 30 days of the filing of the "statement" constituting the application for the acquisition of control. *See* D.C. Code § 31-703(g)(2). A fast-track procedure that requires opening and rebuttal evidence within 30 days of the filing of an application might be acceptable in the case of a proposed acquisition of control of a property and casualty insurer. It makes no sense in the context of this case, laden as it is with highly sensitive issues and the most acute concerns about health care.

Moreover, the proposed schedule would effectively deny the right of rebuttal. The D.C. Administrative Procedure Act enumerates the "right . . . to submit rebuttal evidence" in parity with the other basic rights of parties to present evidence and conduct cross-examination as necessary for a full and true disclosure of the facts. D.C. Code § 2-509(b). A one-week interval between opening and rebuttal evidence, in the context of this case, effectively denies this right, just as a rule that categorically limited all cross-examination to 15 minutes would effectively deny that right.

More broadly, the attempt to accommodate the 30-day requirement by making the July 16 filing a "draft" application, and deferring the final application until October 15, would create a gravely imbalanced process. The requirement to file opening evidence and opening Pre-Hearing Briefs one week after the Applicant has filed the final Application would mean that Parties other than the Applicant would *never* have had an opportunity to submit opening evidence or Pre-Hearing Briefs with respect to the *final* Application. Opening evidence and briefs filed on October 22 could as a practical matter address only the *draft* application that would have been filed on or before July 16. There would be no effective opportunity for Parties to submit opening evidence addressing material changes in or additions to the Application between the draft and final versions. Such changes, of course, are virtually certain. This deficiency in the proposed schedule would not be cured by the opportunity to file rebuttal evidence and a Reply Brief one week after the opening evidence, because a total of two weeks from the final Application is also an insufficient amount of time. Moreover, a further anomaly is that the latest date for discovery requests under the Proposed Order would occur six weeks *before* the filing of the final Application.[3]

In short, Applicant would have had three tries at completing the Application, over a period of nine months, with specific guidance from the Commissioner (who has undertaken to "communicate with the Applicant by letter concerning the specifics of such deficiency," Preliminary Order, at 2). Other Parties would have one week to respond to the final Application (which is no practical opportunity at all) and one week to rebut whatever additional evidence the Applicant submitted

[3] The Proposed Order would require discovery requests to be served not later than 30 days in advance of October 4, 2002. Proposed Order, at 4.

None of these shortcomings is necessary. The 30-day requirement does not preclude procedures suitable to this case. By far, the simplest and speediest solution would be for WellPoint to agree to an extension of the 30-day period. D.C. Appleseed suggests accordingly that the Commissioner request WellPoint's agreement to an extension of the 30-day period.[4] In that way, Applicant's July 16 filing could be the final Application, rather than another draft. If the July 16 filing is the final Application, Parties would have time for discovery, and could file opening Pre-Hearing Briefs and evidence on the date proposed in the Proposed Case Management Order, October 22, with full knowledge of the content of the final Application. Rebuttal evidence and Reply Briefs could be required a reasonable interval thereafter. Given the complexities of this case, that interval should be at least 30 days.

Under that schedule, the hearing could begin during the first week in December, approximately three weeks after the November 12 start date in the Proposed Order. There could be no prejudice to WellPoint from such an extension. Indeed, WellPoint stated when it announced the agreement with CareFirst that an 18-month period would be within its expectations and would allow management to complete the integration of RightCHOICE Managed Care.[5] The schedule just outlined would easily allow for a final decision by the Commissioner well before the end of that 18 months (which would run

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[4] D.C. Appleseed respectfully suggests that the request be in writing and part of the public record, along with WellPoint's response, and that D.C. Appleseed be given the opportunity to be present during any conversations between the Commissioner and WellPoint relating to the extension.

[5] WellPoint Press Release: "WELLPOINT AND CAREFIRST BLUECROSS BLUESHIELD TO MERGE" (November 20, 2002), available at http://www.wellpoint.com/press_room/press_releases/2001/11-20-01.asp. Eighteen months from November 20, 2001 would be late May, 2003.

until late May, 2003).[6]

During the CareFirst consolidation proceeding in 1997, which also was governed by the Holding Company Act, GHMSI apparently agreed to (or acquiesced in) a substantial extension of the 30-day period, well in excess of what would be necessary here.[7] If WellPoint now refuses to agree to an extension of the 30-day period, that refusal would tend to confirm the concerns of many that WellPoint will not be responsive to local concerns. In that event, the Commissioner could, as we will now show, take steps consistent with his legal authority to alleviate the shortcomings of the 30-day cycle discussed above.

Although the Holding Company Act imposes a deadline for a hearing once a complete application is accepted for filing, it does not require the Commissioner in every circumstance to accept even a complete application for filing so as to trigger the deadline. The Commissioner has, in effect, already recognized this point. In declining to conduct a public hearing based upon the initial Application, the Commissioner relied not only upon the fact that the Application was "deficient" but upon several discretionary considerations that would have applied even had the application been complete. Thus, the Commissioner noted that (a) the proposed Transaction presents "substantial questions of significant public interest," making it "particularly important . . . that the Application be full responsive to the issues that have been raised or may be raised . . . before the public

[6] If the Commissioner nevertheless considers that three-week extension to be somehow unacceptable, D.C. Appleseed would have no objection if the Commissioner were to schedule the commencement of the evidence and pleading cycle three weeks earlier, on October 1, with rebuttal and Reply Briefs due November 1, so that the hearing could still begin on November 12.

[7] GHMSI filed its application on February 6, 1997, and made a supplemental filing on March 28. The first Notice of hearing appeared in the D.C. Register on August 1, and announced a hearing to begin on September 8, *which was 164 days after the supplemental filing*. The Commissioner published a second Notice on September 26, announcing additional hearings on October 21-22 (subsequently rescheduled for November 4-5). The Commissioner issued his decision on December 23, 1997, 271 days after the supplemental filing, and 320 days after the initial filing.

hearing is held;" (b) the Application may need to address certain issues raised in Maryland and Delaware; and (c) delay in the hearing will allow more effective coordination with the independent approval of the Corporation Counsel. Preliminary Order, at 2. These additional considerations properly related to ensuring a complete public record, an accurate public interest determination, and the sound management of this docket. None of these considerations depended upon deficiencies in the Application.

The Commissioner's view that he could act to ensure an accurate public interest determination accords with a recent important decision in the U.S. Court of Appeals for the D.C. Circuit, which upheld a 15-month agency moratorium on processing railroad merger applications despite heavily prescriptive statutory deadlines for such processing. *See Western Coal Traffic League v. STB*, 216 F. 3d 1168 (D. C. Cir. 2000). The Court relied on "numerous cases upholding agency decisions to defer actions mandated by statute . . . where doing so is administratively necessary in order to realize the broader goals of the same statute." 216 F. 3d at 1173.

The Commissioner's ability as an exercise of sound discretion to avoid triggering the 30-day period would enable him to bifurcate his consideration of the Transaction under the two statutes that govern it. As the Commissioner noted in the Preliminary Order, the conversion of GHMSI is a "necessary prerequisite" to any acquisition of control of GHMSI by WellPoint. Preliminary Order, at 1. That "prerequisite" is governed by a separate statute that allows the Commissioner broad flexibility in fashioning procedures suitable to the matter at hand. *See* D.C. Code § 31-3515(g). Applicant chose to present a single filing as both the "statement" required under the Holding Company Act, D.C. Code § 31-703(a)(2) and the "plan and procedure for conversion" under the Medical Services Act, D.C. Code § 31-3515(a). But Applicant's

preference does not control the Commissioner's docket. The Commissioner would be well within his discretion to bifurcate the proceedings, in order to determine first whether the conversion would satisfy the Medical Services Act and then, in a subsequent phase, whether the acquisition of control would satisfy the Holding Company Act.

Issues governed by the Medical Services Act would include CareFirst's claimed need to convert in order to remain viable, whether it would be viable if it converts but does not merge, the ability of CareFirst as a nonprofit health insurer to fulfill a "charitable and benevolent" mission in the District, whether CareFirst has adequately been fulfilling its "charitable and benevolent" obligation, and whether a conversion to for-profit status is inherently likely to have adverse affects on the availability, accessibility, or affordability of health care, even without an acquisition.

Thus, threshold issues that now would be jammed into the 30-day period could be considered first and separately under a more suitable timetable. If, as a result of such consideration, the Commissioner decides not to approve the conversion, the expenditure of substantial public and private resources that would be entailed in the proceedings under the Holding Company Act would have been avoided. If the Commissioner approves the conversion, the number of issues remaining to be litigated would have been reduced.[8]

III. IDENTIFICATION OF ISSUES

The Healthcare Entity Conversion Act of 1997 provides that no healthcare entity shall convert to a for-profit entity without the approval of the Corporation Counsel, and assigns to the Corporation Counsel the determination whether the charitable assets of the

[8] The applicability of the 30-day requirement if the Commissioner has approved the conversion could be determined at that time. The Commissioner has reserved the right to supplement or modify procedures "whenever necessary to protect the interests of justice and to assure that the proceedings will be conducted in an orderly manner." Proposed Order, at 6.

converting healthcare entity will be "adequately protected." D. C. Code § 44-603(b). The Commissioner's Preliminary Order appropriately emphasizes the importance of coordination with the Corporation Counsel in order "to minimize duplicate proceedings." Preliminary Order, at 2.

In making the determination whether charitable assets in this case will be adequately protected, the Corporation Counsel is directed by statute to consider, among other things, whether CareFirst exercised due diligence in deciding to sell, in selecting the purchaser, and in negotiating terms and conditions; used fair and objective procedures it making its decision, and used appropriate independent experts; disclosed all potential conflicts of interest; will cause the "enrichment" of any person; will receive fair value for its assets; will place charitable funds at unreasonable risk; has retained a right of first refusal to permit purchase of its assets by a successor nonprofit if WellPoint subsequently proposes to merge with another entity or to sell the CareFirst assets; and whether the charitable assets have been placed in a suitable charitable trust. D.C. Code § 44-603(b).

We assume that, under these provisions, the Corporation Counsel and not the Commissioner will consider both the sufficiency and the allocation of the purchase price, as well as the process by which CareFirst arrived at the critical decisions. Nevertheless, there is a possibility of overlap between the proceedings to be conducted by the Commissioner and those of the Corporation Counsel, given the broad standards in the statutes that the Commissioner will be applying (*e.g.*, "inequitable to contractholders . . . or to the public" in the Medical Services Act, and "the public interest" in the Holding Company Act). Some more particular provisions may overlap as well (*e.g.*, the requirement in the Medical Services Act that the Commissioner consider whether any nonprofit assets will "inure" to any officer or director of CareFirst).

Moreover, WellPoint seems to have taken the position in its initial filing that health impacts should be assessed by taking into account the potential of the public foundation to offset any adverse effects of the Transaction on the availability, accessibility, or affordability of health care in the affected areas. On this approach, the funding, mission, governance, and likely activities of the public foundation – all matters within the purview of the Corporation Counsel -- could become a direct part of the public interest determination by the Commissioner. This potential overlap may itself require additional procedures that cannot now be foreseen.

For these reasons, an important early step in coordinating the activities of the Commissioner and the Corporation Counsel would be a proposed joint statement of the issues to be considered by each, with opportunity for public comment. The D.C. Administrative Procedure Act requires in a contested case that the notice of hearing identify the issues involved. D.C. Code § 2-509(a). The present case, however, involves two D.C. decisionmakers and three statutes, none of which has ever been applied to the conversion and acquisition of control of a nonprofit health insurer, and one of which has never been applied at all. We respectfully suggest that, in the circumstances of this case, a much earlier identification of the issues to be decided by each decisionmaker is essential to an efficient and fair procedure. A proposed joint statement with opportunity for comment would facilitate coordination, and could identify the need for special procedures. Such a statement need not be very detailed, but should fairly apprise interested persons of the proposed allocation of responsibilities between the Commissioner and the Corporation Counsel. A joint statement of issues could, of course,

be amended as issues get refined or as further issues emerge.[9]

IV. BURDEN OF PROOF

The Commissioner has stated that opponents of the Transaction have the burden of proof, because the Holding Company Act and the Medical Services Act direct the Commissioner to approve unless he makes certain contrary findings. *See* D.C. Code §§ 31-3515(b), 31-702(g)(1). We believe, however, that the statutory provisions mean no more than that the burden of coming forward with evidence opposing a facially complete application rests with opponents. The statute facilitates non-controversial proposals by requiring the Commissioner to approve an uncontested, facially complete application. If, however, opponents introduce credible evidence on a material issue, the burden of coming forward on that issue shifts to the party seeking approval, and that party bears the ultimate burden of proof (risk of non-persuasion) on that issue. The Commissioner should so state in his final procedural order.

To interpret the statute otherwise would impose risks on the public that the Council is unlikely to have intended. For example, suppose that opponents have submitted credible evidence that the Transaction is likely to cause substantial increases in health insurance premiums in the District, over and above increases in underlying medical costs; that Applicant has submitted evidence but no binding assurances to the contrary; and that the Commissioner considers the record to be inconclusive on the issue and cannot make a finding one way or the other. If opponents were to have the burden of

[9] There is no reason why the Corporation Counsel could not participate in such a joint statement of issues prior to his receipt of the Commissioner's formal "request" under D.C. Code § 44-606(a) to review the conversion. It will, in fact, contribute to orderly coordination if the Commissioner defers his request to the Corporation Counsel to review the Transaction, because that request would trigger the 60-day period under the Healthcare Entity Conversion Act within which the Corporation Counsel is directed to issue a decision. *See id.* The Corporation Counsel may extend this period if doing so "will not unnecessarily delay" the Commissioner's decision. *Id*. Nevertheless, it seems simpler for the Commissioner to defer his request.

proof, then the Commissioner might have to approve the merger even though he is unable to find that premium increases would not be a likely consequence of the Transaction. Even though premium increases appear as likely to occur as not, the Transaction could nevertheless go forward. The public would bear the risk. In the absence of more specific indications that this result would be consistent with the Council's intent, the Commissioner should not read the statute to allocate risks in this fashion.

V. TIMING OF DETERMINATION OF PARTY STATUS

The Proposed Order would establish an Intervention Cut-Off date of July 30, 2002, as the time by which a person wishing to become a Party must file a motion to intervene. Proposed Order, at 2. Only a Party may obtain discovery, so the timing of the Commissioner's decision on a motion to intervene will effectively determine the earliest date on which discovery may begin for a person admitted as a Party.

Under the Proposed Order, the latest date on which discovery requests could be served would be September 4. Proposed Order, at 4 (30 days in advance of the Discovery Completion Date of October 4). Even if the Commissioner decided a motion to intervene within a few days of its filing on July 30, that would leave less than a month for service of discovery. D.C. Appleseed requests that the Commissioner undertake, in the event that persons file motions to intervene in advance of July 30, to decide such motions promptly, and without waiting until after the Intervention Cut-Off date. In that way, persons filing early who become Parties will have the opportunity to initiate discovery at an earlier time.

VI. SEPARATION OF FUNCTIONS

The Proposed Order provides that the staff of the Department of Insurance and Securities Regulation ("DISR") "may offer argument and documentary and testimonial

evidence, including cross-examination of any Party's witnesses and shall participate in this proceeding and the formal administrative hearing . . . to the same extent as a Party." Proposed Order, at 2.

Participation as a Party by DISR staff is unexceptionable so long as it is accompanied by a corresponding separation of functions. Under the requisite separation, staff participating as a Party would not communicate ex parte with the Commissioner with respect to this case, or communicate ex parte with any other staff that is advising the Commissioner with respect to this case. Fundamental fairness requires such separation in a contested case, and the Commissioner should confirm in his final Case Management Order that he will institute such separation.

VII. HEARING PROCEDURES

The Proposed Order states that the Commissioner will promulgate DISR Rules of Practice and Procedure for Hearings prior to the hearings in this proceeding. Proposed Order, at 1. D.C. Appleseed assumes that the Commissioner will provide notice and opportunity for comment on these Rules before adopting them in final form. This procedure would conform to the D. C. Administrative Procedure Act, which requires notice and opportunity for comment with respect to "any rule" except an emergency rule. D. C. Code §§ 2-505(a), (c). There is no exception for procedural rules (unlike the federal Administrative Procedure Act). In any event, notice and comment will help to ensure that the procedures adopted support an efficient and fair hearing.

CONCLUSION

D.C. Appleseed appreciates the opportunity to comment on the Commissioner's Proposed Case Management Order. Fashioning appropriate procedures to govern this complex, multi-statute, proceeding is critical. The revisions D.C. Appleseed proposes will help ensure a fair opportunity to be heard, an efficient proceeding and a sound determination of the public interest.

Respectfully submitted,

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